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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re TYLER B., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

TYLER B.,

Defendant and Appellant.

F062958

(Super. Ct. No. JJD064084)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Juliet L. Boccone,
Judge.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay
Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J., and Franson, J.

INTRODUCTION

On December 6, 2010, a petition was filed pursuant to Welfare and Institutions Code section 602 charging Tyler B. with attempted murder (Pen. Code, §§ 664 & 187, subd. (a), count 1)¹ and shooting at an inhabited building (§ 246, count 2). Count 1 alleged criminal street gang allegations (§186.22, subd. (b)(1)(C) & (b)(5)) and that Tyler used a gun (§ 12022.53, subd. (c)). Count 2 alleged criminal street gang allegations (§186.22, subd. (b)(1)(C) & (b)(4)) and that Tyler used a gun (§ 12022.53, subd. (c)).

At the conclusion of a contested jurisdictional hearing on January 31, 2011, the juvenile court found the allegations in the petition to be true. At the conclusion of the disposition hearing on June 3, 2011, the court committed Tyler to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice for a maximum term of confinement of 20 years 4 months plus 15 years to life. On appeal, Tyler contends there was insufficient evidence of his specific intent to commit attempted murder. We disagree and affirm the juvenile court's orders.

FACTS

During the afternoon of September 24, 2010, 14-year-old Roman C. was playing outdoors with his younger brother Jacob C. and their two friends Pedro L. and Jorge L. The two families lived behind one another in Exeter. The boys were playing near a church a block away from Roman's house (C. house). Tyler's house was next to the church. Jorge and Jacob were at the church hiding in the bushes from Pedro and Roman. Tyler and another person exited Tyler's home, jumped a fence, and ran toward the alley of Jorge's home.

Jorge and Jacob went first to the C. house, and then went toward Jorge and Pedro's home (L. house). Jorge called Pedro from the C. house. Jorge asked for Pedro

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

and Roman to pick them up and take them to the L. house. Pedro thought Jorge sounded scared. Jorge was worried that something bad was going to happen. When Jorge and Jacob started toward the L. house, they saw Tyler and another person in a field walking ahead of them toward the L. house. Jorge told investigating officers that one of them was carrying a gun.

When Jorge and Jacob went back to the C. house, they heard about four gunshots coming from the L. house. After the telephone call, Pedro and Roman were on their way from the L. house, about 10 feet away, when they saw two males about 30 feet away walking toward them through the field next to the L. house. The white male was carrying a gun and wearing a hoodie over his face. Although it was dark, Roman could see the gunman because of the house light.

Pedro recognized the Caucasian male as Tyler. Tyler was holding an object in both hands that was dark in color. Pedro and Roman were afraid. A few days earlier there had already been a drive-by shooting at the L. house. Pedro and Roman ducked under a truck parked in the L. house driveway. Pedro saw Tyler pointing a gun at his house. From underneath the truck, Roman heard gunshots.

Prior to hearing gunshots, Pedro heard three or four clicks. Roman ran toward the door of the L. house, opened the door, and slid inside on his stomach with his feet entering the doorway in an arching motion. As Roman ran toward the front door, he heard gunshots. Pedro heard three or four gunshots. Pedro was not certain of Roman's location but thought he was in the house.

Roman initially told the police that the white male was Tyler. Roman picked Tyler out of a photo lineup. Roman would not identify Tyler as the shooter at the hearing. Roman claimed he could not remember telling the police about being under the truck or running into the house. Roman was nervous testifying in front of Tyler. Roman said that Pedro had a problem with Tyler. Roman also had a problem with Tyler.

Pedro's older brother, F.L., was at home on September 24, 2010. F.L. was inside his house during the first shooting a few days earlier. During the second shooting, F.L. was outside the house inside the fenced yard on the side closest to the field next to his house. F.L. is tall enough to see over the fence. F.L. saw two people about 28 feet away approaching the house through the empty lot. One of the two males had a white T-shirt wrapped around his head covering his face and ran in a crouched-over posture. F.L. heard gunshots and ducked down.

Five prank telephone calls were made to the L. house that evening. F.L. answered one of the calls. The caller said "Fuck you." F.L. picked up a call at 8:00 p.m. F.L. said "F you" to the caller and unplugged the phone. About two hours after the last phone call, F.L. heard gunshots in front of his house. The police arrived within five minutes after the gunshots.

Exeter Police Officer Brett Inglehart was dispatched to the scene of the shooting at 10:50 p.m. Inglehart spoke to Roman C., who was excited and scared. Roman explained that Tyler shot at him.² Roman described Tyler by name and said he was carrying a black handgun. Roman told Inglehart that he was hiding under a truck, ran to the front door of the house, and began taking gunfire. Roman stated that stucco from the side of the house was exploding in front of him. Roman thought four or five bullets were fired at him.

Inglehart collected four spent .22-caliber shell casings and one live round within a 10-foot diameter area in front of the L. house. Two spent shell casings were in the driveway of the house. One shell casing was on the sidewalk directly in front of the residence next to the live round. The last spent shell casing was found inside the

² Defense counsel objected to Inglehart's testimony concerning what Roman told him because Roman's testimony was not impeachable unless the court found he was being dishonest. The court stated it believed that Roman was dishonest in his testimony.

residence. The location of the shell casings was consistent with being fired from one location.

There were two bullet holes in the interior wall of the living room. There was a bullet impact on the front porch on the south side of the front door by the doorbell, causing an impact mark on the stucco, and a graze mark on the front door jamb all made by .22-caliber bullets. Inglehart was aware there had been a drive-by shooting a few days earlier and was not positive whether the bullet strikes found on September 24th were made that night or previously.³ Inglehart explained that while standing in the location where the spent shells were found, he had a direct line of sight in the direction of the L. house.

Officer Susan Chhean testified that she took a statement from Jorge who identified Tyler as the person carrying something long that he thought was a gun. F.L. told Chhean that Tyler was wearing a white shirt and checkered shorts. F.L. told Chhean that he began answering the phone at 10:37 p.m. and a male voice said “north side, norte, paisa, and scraps.”

Officer Mark Frick testified as an expert on criminal street gangs. Based on Tyler’s statements in custody asserting membership, Tyler’s clothing, and Tyler’s involvement in gang-related crime, Frick was of the opinion that Tyler was an active

³ On September 20, 2010, four days prior to the instant incident, Officer David Diaz examined the L. house after a drive-by shooting. Diaz found the front exterior of the residence had been struck by gunfire three times. There were bullet impacts to the stucco wall and the front door of the house. One bullet went through a glass window. Diaz found three more areas of bullet damage just inside the house. One bullet traveled into the living room wall just inside the front door at shoulder height. The bullet had gone completely through the drywall. A second bullet traveled through a small interior wall between the kitchen and living room. A third bullet hit a kitchen cabinet, entering and exiting on the other side of the cabinet. Diaz found no other damage to the inside or outside of the house that was consistent with the earlier drive-by shooting on September 20th.

member of the Norteno gang. Frick explained that the term scrap, or scrapapa, is a derogatory term used to describe a member of the Sureno gang. Tyler's current offenses would benefit the gang and enhance the reputation of the shooter by causing intimidation and instilling fear in the victims.

Tyler was questioned by Detective Green with his mother present. The session was recorded. The recording was played during the hearing. Tyler claimed a friend gave him the gun earlier that evening and he wrapped it in a carpet and hid it in a wood pile in the backyard. Tyler said he then went to visit his friend, Tony A.

At 11:00 p.m., Tyler said he went with Tony to pick up Tony's mother and the three went to King Buffet in Visalia. After initially stating that he was wearing gray shorts, Tyler eventually admitted he was wearing a white tank top and checkered shorts. More than once, Tyler denied shooting the gun and told the investigators they had the wrong guy. Tyler suggested that his friend Jonathan may have been involved in the shooting.

Investigators suggested to Tyler that he pulled the gun trigger three times, it jammed on him, he cleared a round, and fired four times at Roman as Roman entered the house. Tyler replied that the police had the wrong guy. Later, Tyler admitted that around 11:00 or 11:30 p.m. he took the gun with Jonathan, jumped over his backyard fence, and went to the open field next to the L. house. Tyler stated that he only shot two or three rounds. Tyler denied shooting at the house four or five days earlier. Tyler shot at the house because he thought the people in the L. house were snitches.⁴

Tyler told investigators that he fired the gun because people had snitched on his mother. Tyler denied he was trying to intentionally shoot Roman, he was only trying to

⁴ Tyler's mother apparently rescued a dog she believed was starving and members of the L. house informed the police that she had stolen the dog.

scare him. When a door to the house opened, Tyler said he shot at the windows. Tyler said he was aware that the L. house was affiliated with the Southern gang. Tyler stated that he thought he shot at F.L. Tyler denied belonging to a gang but admitted hanging out with them.

A paper plate with gang symbols written in black and red ink was found near the wood pile in Tyler's backyard. The gang moniker indicated an affiliation with the Northern gang. The plate also had the number "187" written on it. Tyler was aware that the number 187 referred to the Penal Code section for murder. Tyler initially denied writing on the paper plate, but admitted having a black sharpie for arts and crafts. Tyler stated that Victor A. was with him during the shooting, not Jonathan. Tyler admitted it was his idea to carry the gun and shoot it.

Detective Green retrieved a .22-caliber semiautomatic rifle from a woodpile inside a carpet exactly where Tyler said it would be. The rifle was loaded with ammunition and operable. Both ends of the rifle had been sawed off.

DISCUSSION

Tyler argues at length that he only intended to shoot at a house and was not taking aim at a specific person. Tyler contends there was insufficient evidence to support the juvenile court's finding that he had specific intent to commit attempted murder.

In considering the sufficiency of the evidence in a juvenile proceeding, appellate courts review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, or, evidence that a reasonable trier of fact would find the defendant guilty beyond a reasonable doubt. The reviewing court must presume in support of the judgment every fact the trier of fact could reasonably deduce from the evidence. All reasonable inferences must be made that support the juvenile court's findings. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089; also see *People v. Thomas* (1992) 2 Cal.4th 489, 514.) Appellate courts resolve neither credibility

issues nor evidentiary conflicts in determining the sufficiency of the evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Resolution of conflicts and inconsistencies in testimony is in the exclusive province of the trier of fact. (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

The mental state for murder is different from attempted murder. Murder does not require intent to kill. Implied malice, a conscious disregard for life, is sufficient. Attempted murder, in contrast, requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. For a defendant to be convicted of attempted murder, the prosecution must prove the defendant acted with the specific intent to kill the victim. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) The doctrine of transferred intent, when the defendant intends to kill one person but mistakenly kills another, does not exist in attempted murder. The defendant must intend to kill the victim, not someone else. (*Id.* at p. 740.) Intent to kill and express malice are equivalent to one another. To be guilty of attempted murder, a defendant must harbor express malice toward the victim. Express malice requires proof that the assailant desired to kill the victim, or knows to a substantial certainty that death will occur as a result of his or her conduct. (*Id.* at p. 739.) Evidence of motive is often probative of intent to kill. (*Id.* at p. 741.)

Intent to kill, or express malice, can be inferred from the defendant's acts and the circumstances of the crime. There is rarely direct evidence of the defendant's intent, which must be inferred from all of the circumstances of the crime. The act of firing a gun toward a victim at close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of an intent to kill." (*Smith, supra*, 37 Cal.4th at p. 741.)

Together, these principles reflect that purposefully firing a weapon at another human being at close range, without legal excuse, generally gives rise to an inference that

the shooter acted with express malice. The fact that the shooter had no particular motive for shooting the victim is not dispositive. Evidence of motive will usually be probative of intent to kill. The very act of firing the weapon in a manner that could inflict a mortal wound is sufficient to support an inference of an intent to kill. Even if the shooting is not premeditated, merely perceiving the victim as an annoyance or momentary obstacle in the use of lethal force with a weapon will itself give rise to an inference of intent to kill.

(*Smith, supra*, 37 Cal.4th at p. 742.)

In *Smith*, the victim, Karen A., arrived with her boyfriend, Renell, and infant son in a car. The baby was in the car seat directly behind Karen. The defendant and Karen were former friends. The defendant walked over to Karen's car, looked inside the passenger's side window and said, "Don't I know you, bitch?" The defendant testified that he saw the baby seated directly behind Karen. When Renell exited the car and approached the defendant, the defendant lifted his shirt to reveal a handgun in his waistband. Renell reentered the car and Karen started to pull away from the curb. The defendant, who was, according to Karen, the only person armed with a gun, shot into the car from directly behind it with a large .38-caliber handgun. (*Smith, supra*, 37 Cal.4th at pp. 742-743.) The bullet missed both the baby and Karen by inches, shattering the rear windshield, passing through the headrest of Karen's car seat, and lodging in the driver's side door. The baby's face was full of pieces of glass from the rear windshield. (*Id.* at p. 743.)

We find the facts of the *Smith* case to be on point with those in the instant case. Tyler shot four rounds at Roman as Roman tried to enter the L. house. Tyler suggested several inconsistent things during his interrogation. Among these were his implication of Jonathan, and later Victor, as his companion during the shooting, his denial that he fired or carried the gun, his statements that he was only trying to scare people or was only shooting at the windows of the house, his comment that he was trying to hit not Roman

but F.L., his admission that he fired the gun only twice rather than four times, and his comment that he fired the gun because the L. family were snitches.

We find the last comment to be the most illustrative. There was evidence adduced at the hearing that Tyler felt animus toward the residents of the L. house because of their Southern gang affiliation and because Tyler believed they had identified his mother to authorities as taking a dog. These statements, along with other gang evidence pointing to Tyler's active role in the Northern gang, constituted circumstantial evidence of Tyler's specific intent to kill someone in the L. house either because they were affiliated with a rival gang, were snitches, or both.

Even if we discount the gang evidence as indicative of Tyler's specific intent to kill, Tyler fired four bullets directly at Roman with stucco exploding around him as Roman tried to run inside the L. house. As discussed in *Smith*, the very act of firing a weapon in a manner that can inflict mortal injury is sufficient evidence to support a finding of the specific intent to kill. (*Smith, supra*, 37 Cal.4th at p. 742.) We find that there was substantial evidence before the juvenile court that Tyler had the specific intent to kill when he fired a rifle four times at close range, nearly hitting Roman more than once.

DISPOSITION

The orders of the juvenile court are affirmed.